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No. 84-129

In The
Supreme Court of the United States

October Term, 1984

IN RE FLIGHT TRANSPORTATION CORPORATION
SECURITIES LITIGATION

REAVIS & McGRATH, a partnership,

Petitioner,

vs.

FRANK P. ANTINORE, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the settlement of litigation accomplished through a Sharing Agreement is subject to the plan of reorganization requirements of Chapter 11 of the Bankruptcy Reform Act of 1978.

2. Whether the courts below abused their discretion in approving the settlement of a constructive trust claim.

3. Whether the record provided a sufficient basis for the courts below to approve a settlement in a multi-district class action and bankruptcy proceeding.

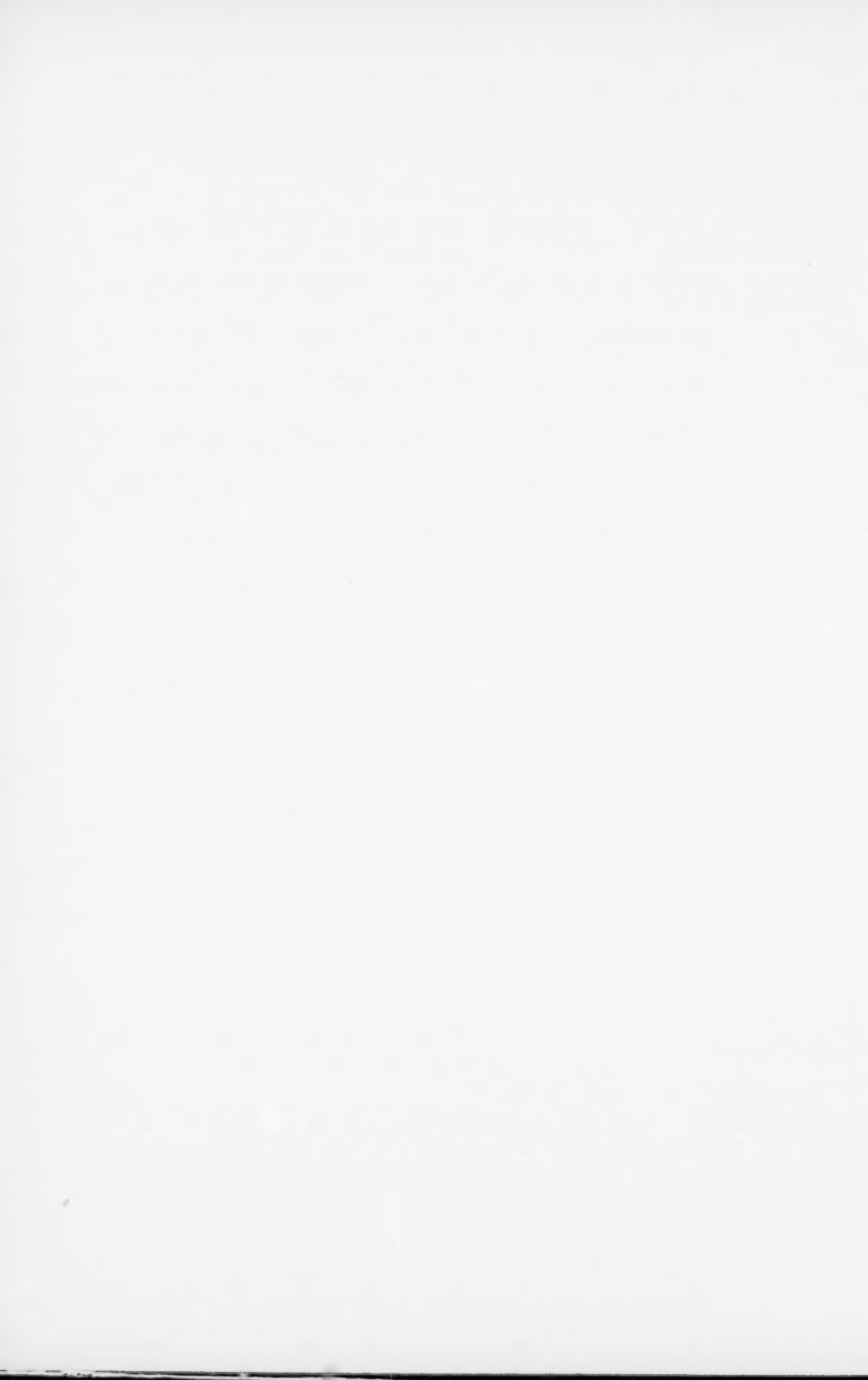


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STATEMENT

Petitioner Reavis & McGrath is a law firm which represented the principal underwriters of fraudulent FTC securities. Because of its involvement, petitioner has been named as a defendant in numerous lawsuits brought by defrauded securities holders. Petitioner's only claim as a creditor of the bankruptcy estate is for whatever potential right of contribution or indemnity it may have against FTC.

Petitioner is not a party to the Sharing Agreement which is at issue in this case. The Sharing Agreement is a court-approved settlement entered into by the court-appointed receiver on behalf of the estate of FTC, certain "participating creditors" who had claims



independent of FTC against alleged wrongdoers, and the defrauded securities holders of FTC. Respondents are all parties to the Sharing Agreement. The Sharing Agreement resolves a substantial dispute between the bankrupt estate and the defrauded securities holders as to which group was entitled to a \$25 million fund ("escrow fund") realized from the sale of FTC securities in June of 1982. This escrow fund was held in escrow pursuant to Court order, and could not be distributed to the bankruptcy estate or securities holders until the constructive trust issue was finally resolved or settled.

Petitioner now asks this Court to review the District Court's approval

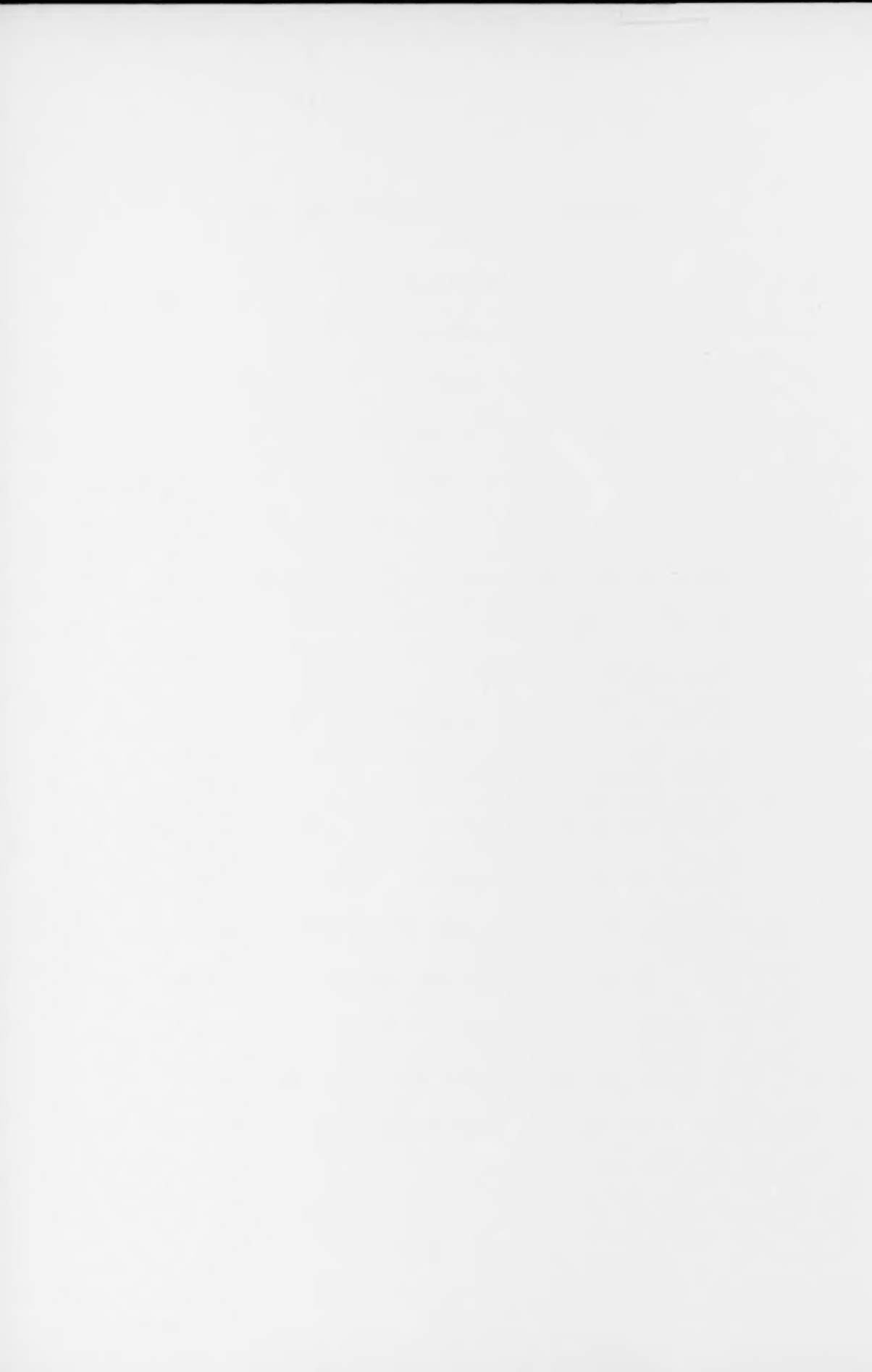


of the Sharing Agreement. Petitioner first argues that creditors' rights were violated because requirements of Chapter 11 were not followed in approving the Sharing Agreement. Petitioner then argues that the bankruptcy estate (and creditors) should not receive any part of the escrow fund, because of a misapplication of section 510(b). It can readily be seen that Petitioner's positions are legally and practically inconsistent, and certainly not designed to protect the best interests of creditors or securities holders.

REASONS FOR DENYING THE WRIT

INTRODUCTION

Before discussing the lack of merit in petitioner's request for certiorari, it is necessary to emphasize that the decisions of the lower courts for which review is sought did not reach the merits of the constructive trust claim earlier asserted in this litigation. The District Court entered an order under F.R.Civ.P. 23(e) that the Sharing Agreement constituted a fair and equitable settlement of a doubtful constructive trust claim. The District Court, acting as the Bankruptcy Court, also entered an order authorizing the debtor-in-possession of the bankrupt estate to enter the Sharing Agreement. The Eighth Circuit held that these



orders were not an abuse of discretion. It can readily be seen that a grant of certiorari to review the lower court approval of the Sharing Agreement would not have any precedential value.

Petitioner has asked the Court to review the decision of the United States Court of Appeals for the Eighth Circuit which substantially approved the settlement embodied in the Sharing Agreement. See 730 F.2d 1128. Petitioner would thereby seek to delay, if not destroy, a fair and reasonable settlement reached by the estate of FTC and the securities holders - the only legitimate claimants to the escrow fund. Petitioner is not itself a claimant to that fund. Prior to lower court approval of the Sharing Agreement, the estate and the securities

holders had fought for almost one year to determine who had the best claim to the escrow fund. The Sharing Agreement ended that dispute by essentially splitting the escrow fund between the estate and the securities holders.

I.

THE SETTLEMENT OF LITIGATION
ACCOMPLISHED THROUGH THE SHARING
AGREEMENT DOES NOT CONFLICT WITH
THE DECISIONS OF THE OTHER CIRCUIT
COURTS

Petitioner asserts that this case raises substantial questions that the bankruptcy procedures followed by the District Court, and upheld by the Eighth Circuit Court of Appeals, are in conflict with prior decisions of the Second Circuit, In Re Lionel Corporation, 722 F.2d 1063 (2d Cir. 1983),

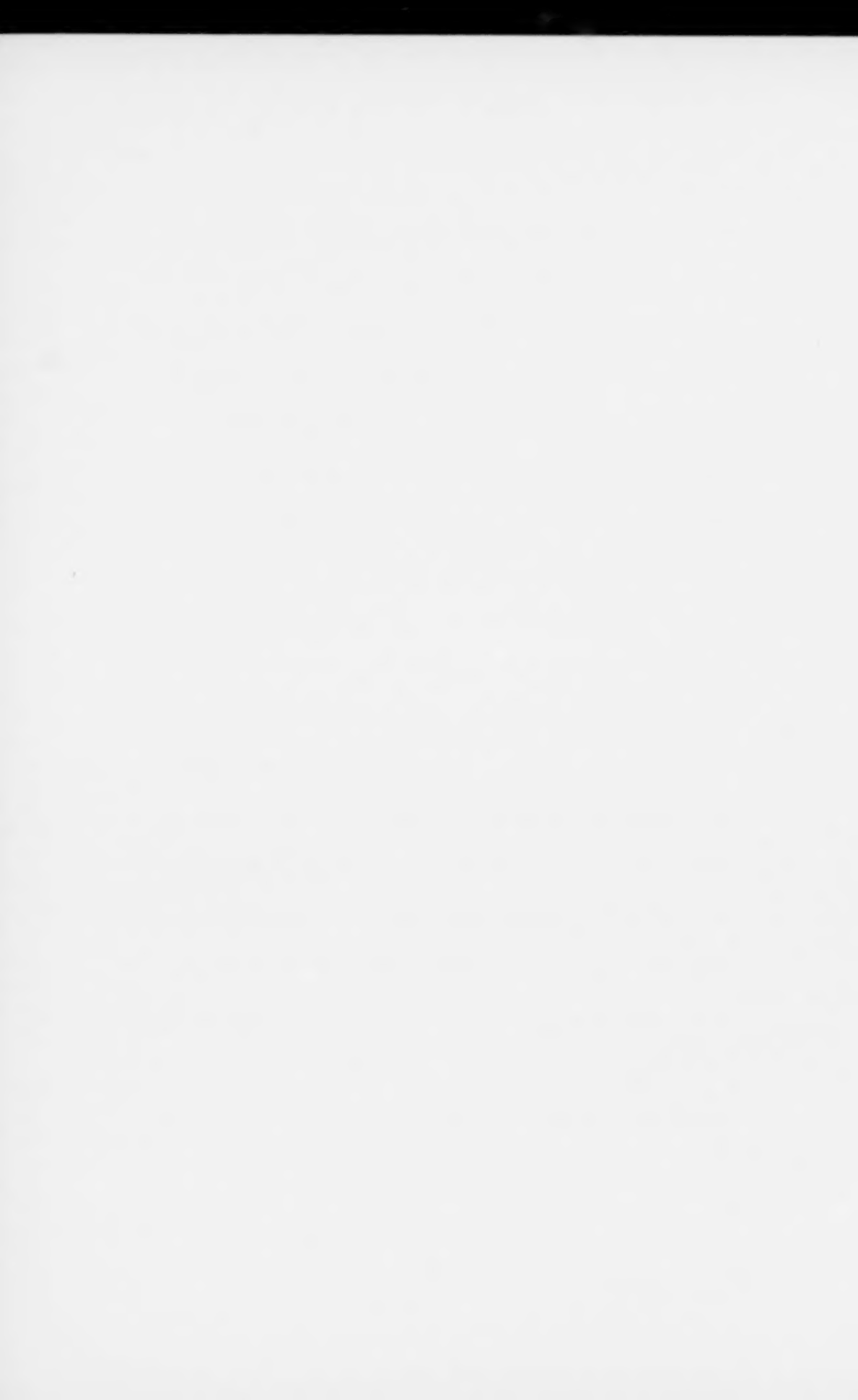


and the Fifth Circuit, In Re Braniff Airways, Inc., 700 F.2d 935 (5th Cir. 1983). In so arguing, petitioner not only misconstrues the opinions from the Second and Fifth Circuits, but fails to comprehend the holding of the lower courts in this case. The cases relied on by petitioner involve the disposition of assets of a bankruptcy estate, while this case involves a court-approved settlement by which the estate is able to obtain assets of which the ownership was in dispute.

The District Court, acting as the Bankruptcy Court, authorized the debtor-in-possession to become party to the Sharing Agreement only after notice was first given to all creditors and other parties to this proceeding.



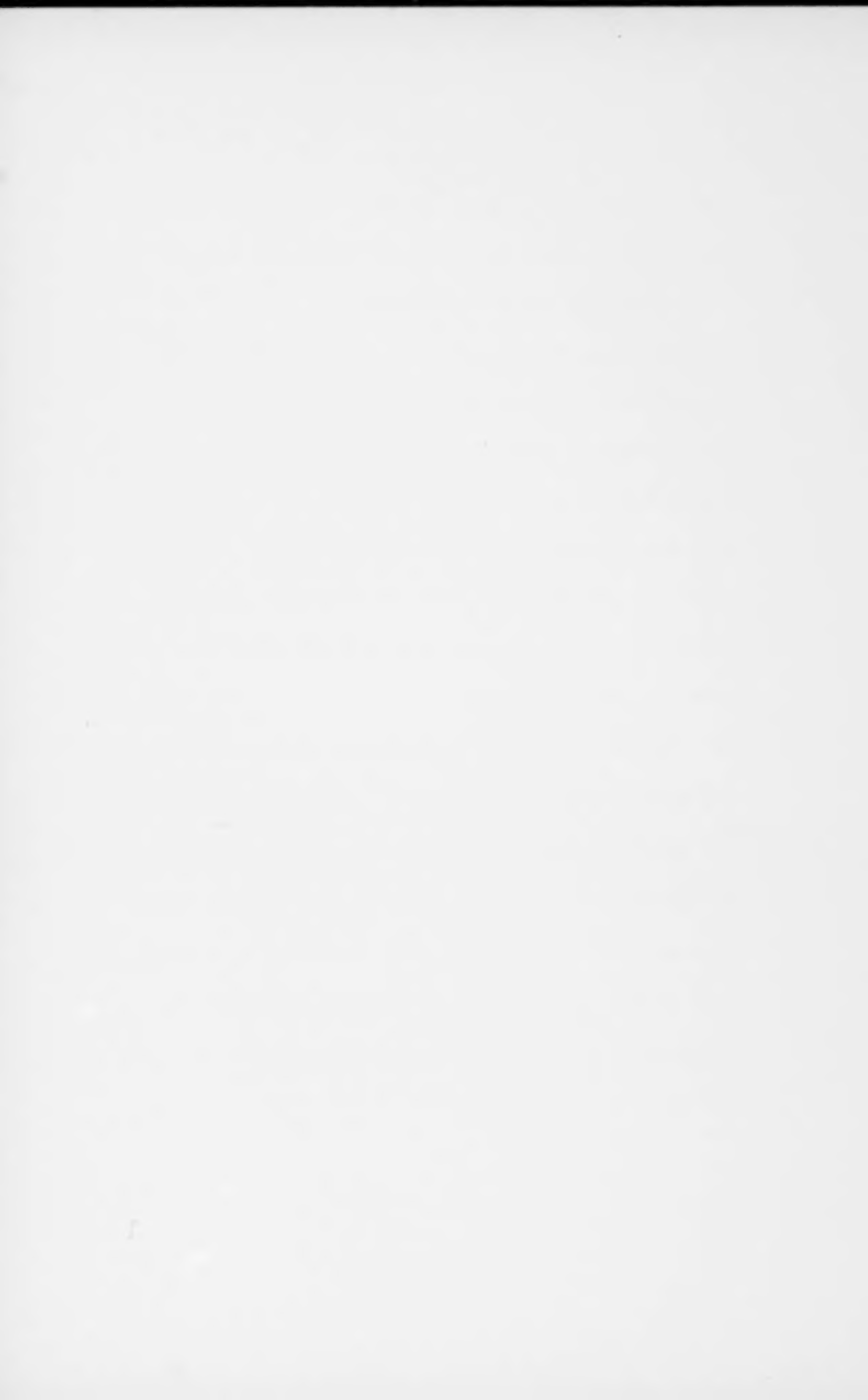
A full hearing was then held to determine if the Sharing Agreement was in the best interests of creditors and other interested parties. Petitioner argues that the District Court was required to go beyond the due process accorded by the notice and hearing, and follow the requirements of Chapter 11 of the Bankruptcy Code which govern confirmation of a plan of reorganization. The Sharing Agreement, however, is not a plan of reorganization. The Sharing Agreement simply allows the FTC estate to obtain certain assets, i.e., a significant portion of the escrow fund, but does not determine how the assets will ultimately be distributed to creditors. Further proceedings must occur in accordance with



the bankruptcy law, before any of the assets secured by the estate can be distributed to creditors.

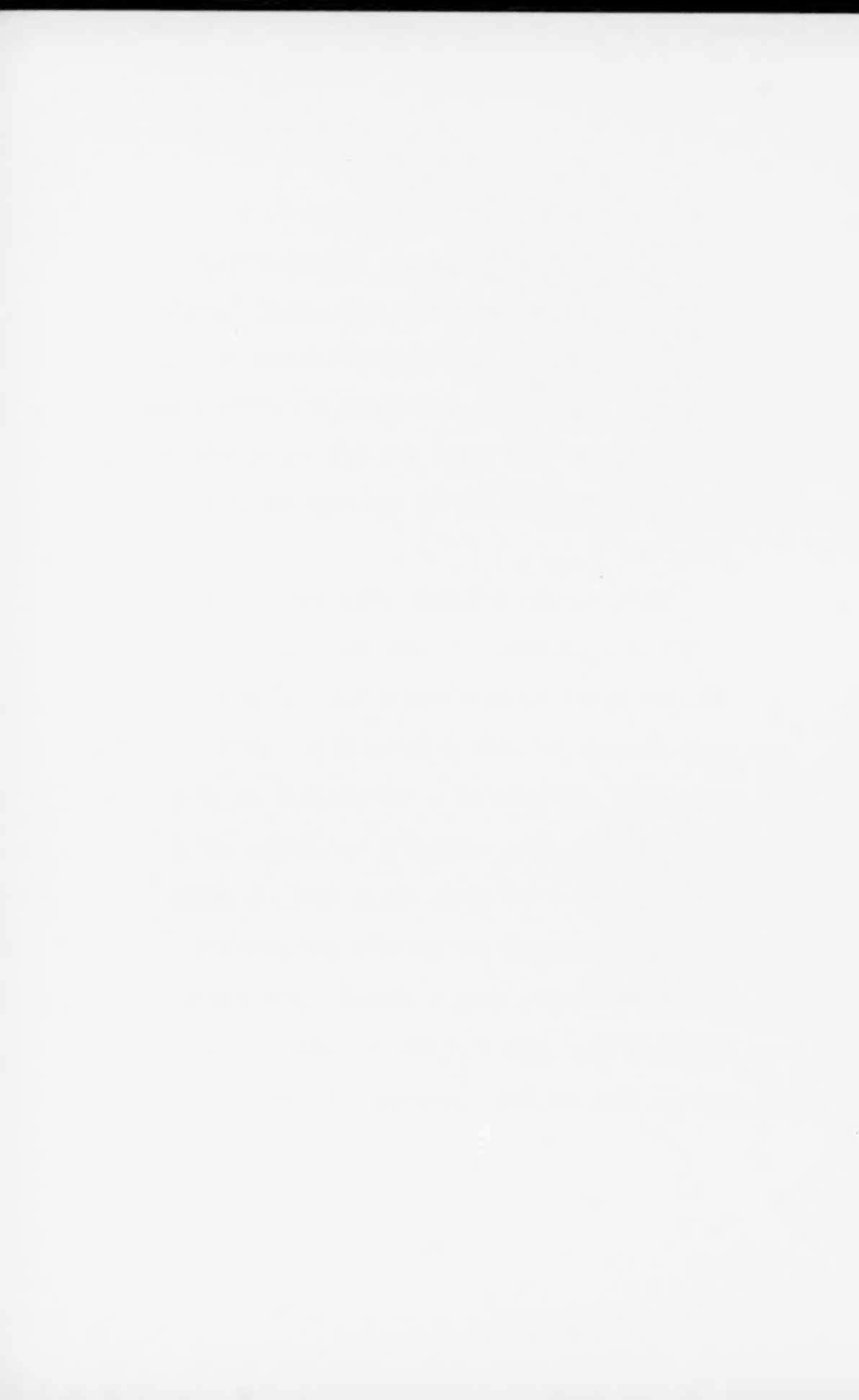
The principal focus of the Sharing Agreement is the escrow fund of approximately \$25 million. Two groups had legitimate claim to that money: (1) the estate of FTC, including the general creditors represented by the estate, and (2) the allegedly defrauded securities holders.

Shortly after the commencement of the bankruptcy case, a dispute arose between the estate and the securities holders as to which group had a better claim to the escrow fund. That dispute was finally settled after a year of protracted litigation by the Sharing Agreement. The escrow fund was divided



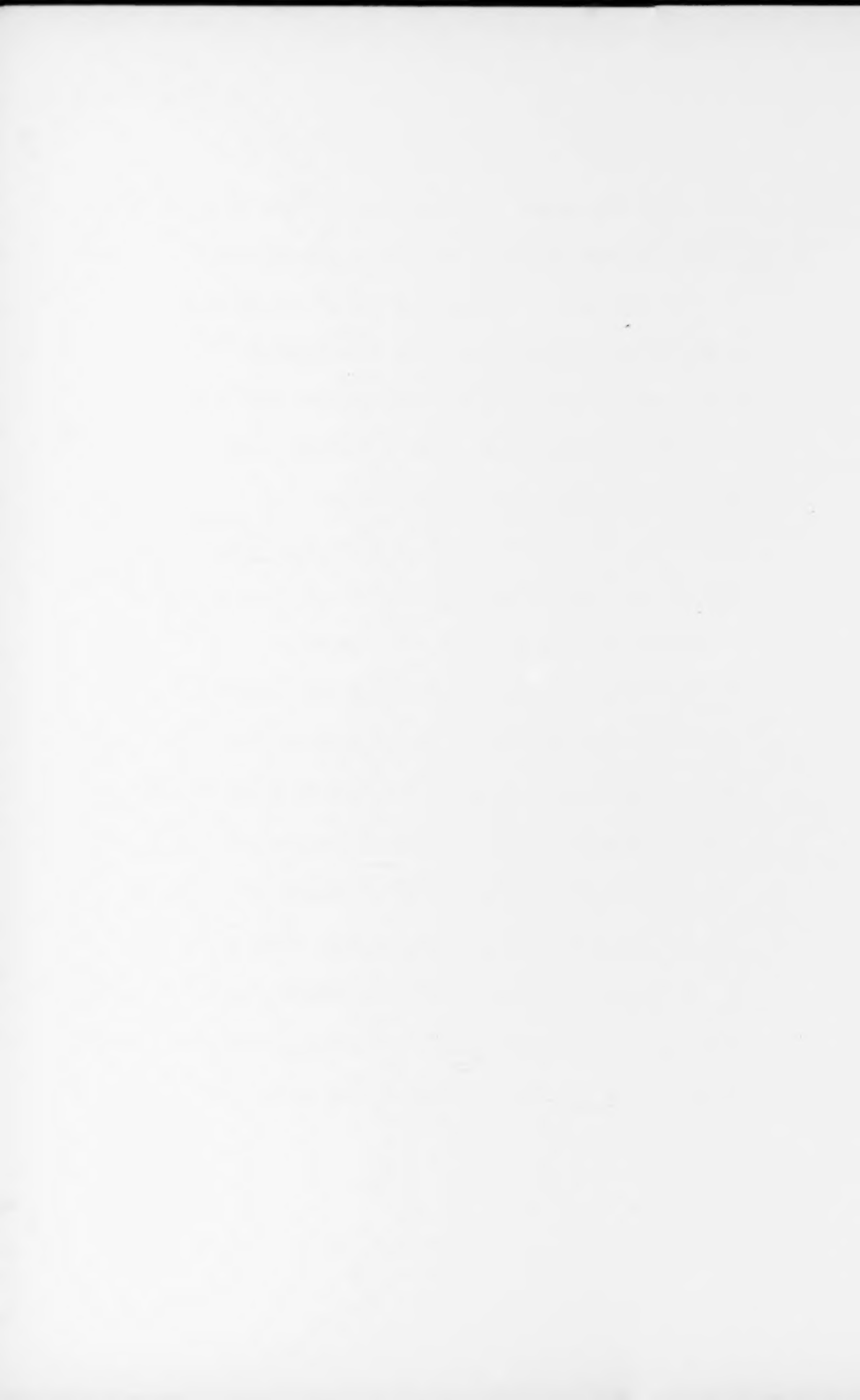
between the competing groups in a manner which was deemed satisfactory to the court-appointed representatives of the estate and the securities holders. Rather than face further legal proceedings and risk an all or nothing approach, the parties agreed to compromise.

Petitioner argues that this compromise disposes of the escrow fund which constitutes "more than 80% of the assets of FTC's estate." This argument erroneously assumes that the escrow fund was already an asset of the estate. If this fund had already been determined to be the property of the estate, there would have been no need for the estate to compromise its claim to the fund and enter the



Sharing Agreement. In fact, the question of the estate's entitlement to a portion of the escrow fund is precisely what the Sharing Agreement settled. Until that question was resolved, no part of the escrow fund was available to the estate.

The Fifth Circuit in In Re Braniff Airways, Inc., supra, held that a sale of substantially all the assets of an estate which delineated the terms of a future plan of reorganization could not be approved without following the procedures required for a plan of reorganization. The Second Circuit in In Re Lionel Corporation, supra, held that the sale of a substantial asset, outside a plan of reorganization, could not be approved absent



extraordinary circumstances. The crucial distinction in those cases is that the assets being disposed of were already assets of the estate and creditors' rights to receive proceeds from the sale of the assets were determined. As such, the creditors in those cases were entitled to the additional rights given under the Bankruptcy Code for confirming a plan of reorganization. Here, the Sharing Agreement brought to the estate assets whose ownership was in dispute. The estate has received \$11 million of the escrow fund, which will now be available for distribution to creditors.

The Eighth Circuit considered and rejected the argument that either Braniff or Lionel applied to the Sharing



Agreement. In both of those cases, property already belonging to the estate was sold and distributed to creditors. In this case, there was no significant asset available to the estate until the dispute over the escrow fund was settled by the Sharing Agreement. Until the assets of an estate are known, no plan of reorganization is possible. The Eighth Circuit thus correctly concluded that the decisions of the Second and Fifth Circuit were not applicable to this case.

Once the Sharing Agreement was entered and approved, the bankruptcy case of FTC could proceed in an orderly manner to a conclusion. Distribution of those assets allocated to the estate under the Sharing Agreement could now

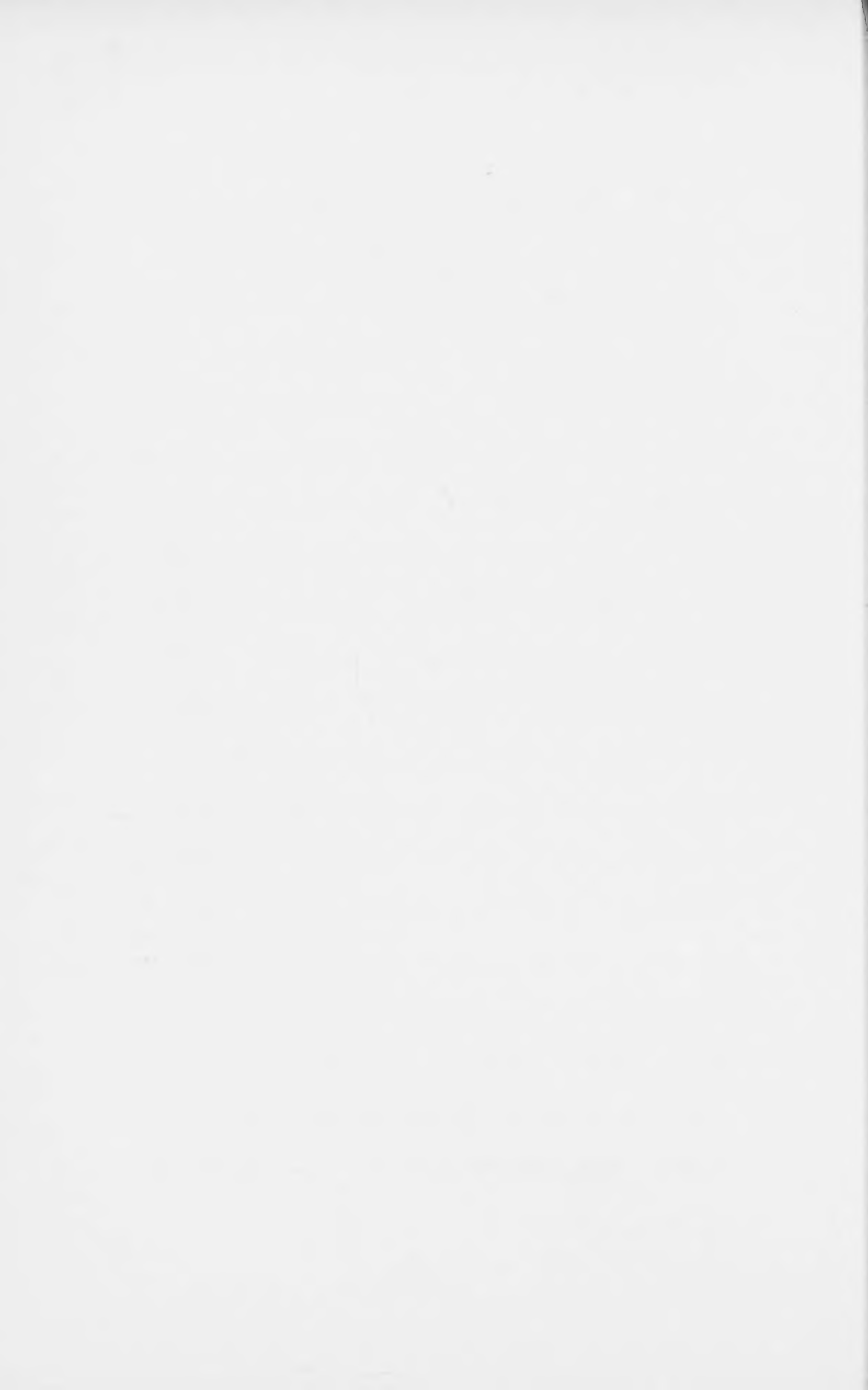


be made subject to a plan of reorganization, or other applicable provision of the Bankruptcy Code. Only after the estate and creditors knew what assets were part of the estate could any "plan" be intelligently formulated.

The Petitioner has not raised the plan of reorganization issue for the purpose of preserving assets of the estate or protecting the interests of bona fide creditors. This is apparent from petitioner's next argument, *infra*, that the estate should not have received any part of the escrow fund. Petitioner has obviously raised the plan of reorganization argument solely to delay implementation of the Sharing Agreement for tactical advantage as a defendant in this litigation.



The Petitioner has attempted to create a conflict among the circuits for purposes of obtaining this Court's review. However, the opinions of the Second Circuit and Fifth Circuit deal with entirely different factual circumstances, and hence they are not at all in conflict with the decision of the Eighth Circuit in this case. The approval of settlements on behalf of bankruptcy estates which compromise disputed ownership of assets are not unusual and arise frequently. This process would be significantly undermined if disgruntled creditors, such as petitioner, could insist that such settlements be made subject to the more time consuming requirements for confirmation of plans of reorganization. The Eighth Circuit and District



Court properly rejected the plan of reorganization argument, and there is no justification or need for review by this Court.

II.

THE LOWER COURTS DID NOT ABUSE THEIR DISCRETION IN APPROVING THE SETTLEMENT OF THE CONSTRUCTIVE TRUST CLAIM.

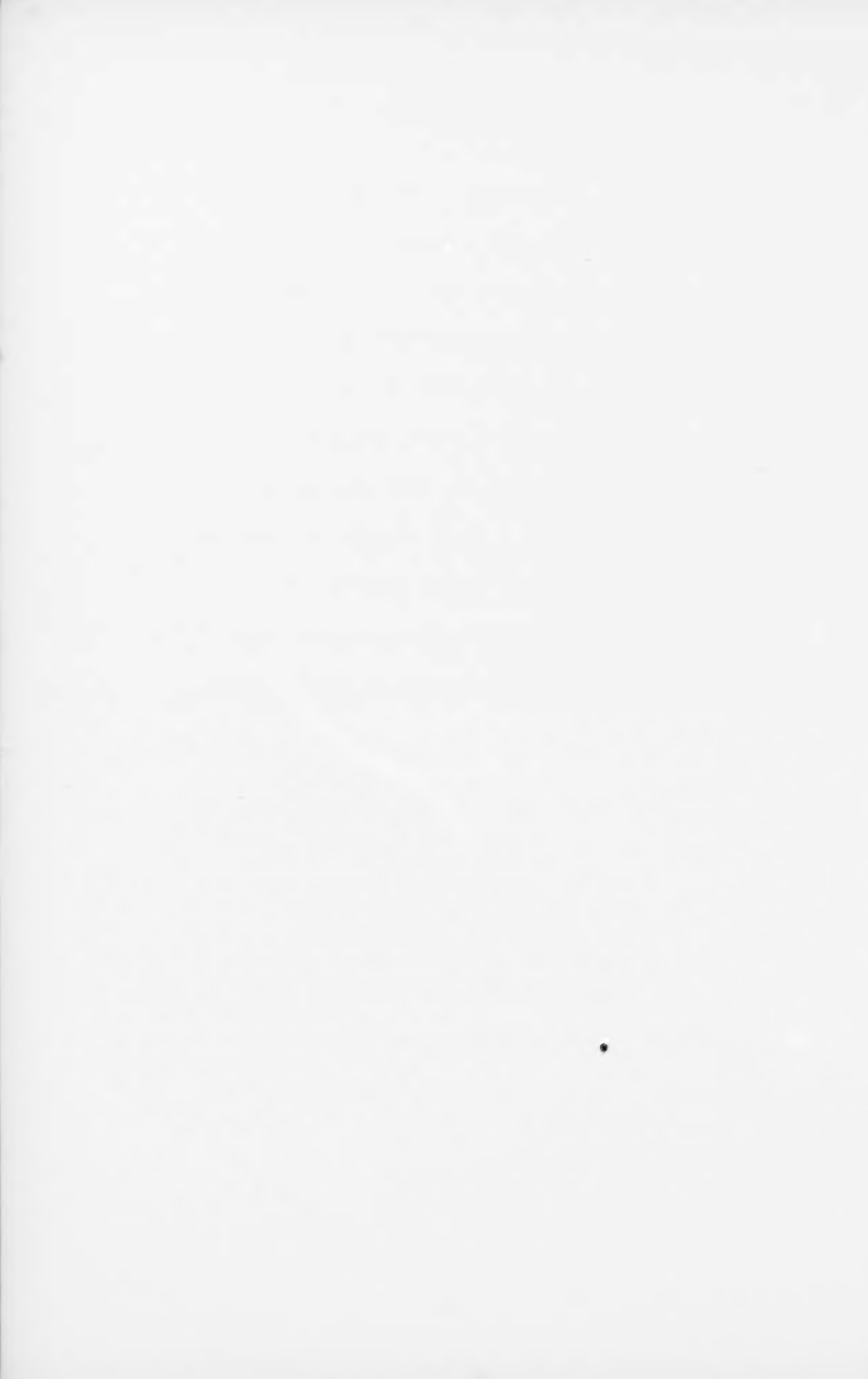
Petitioner has alleged that the Eighth Circuit failed to follow clear statutory law which mandated application of a constructive claim on behalf of securities holders, notwithstanding the plain language of § 510(b). However, because of the settlement accomplished through the Sharing Agreement, neither the District Court nor the Eighth Circuit were required to resolve



that issue. Instead, the District Court only held that each side's position had sufficient merit to justify approval of the settlement under Rule 23(e). The Eighth Circuit, in affirming, determined that reasonable men with knowledge of the facts and law in this case could reach differing conclusions as to which group of claimants had a better claim to the escrow fund. The Eighth Circuit reasoned that:

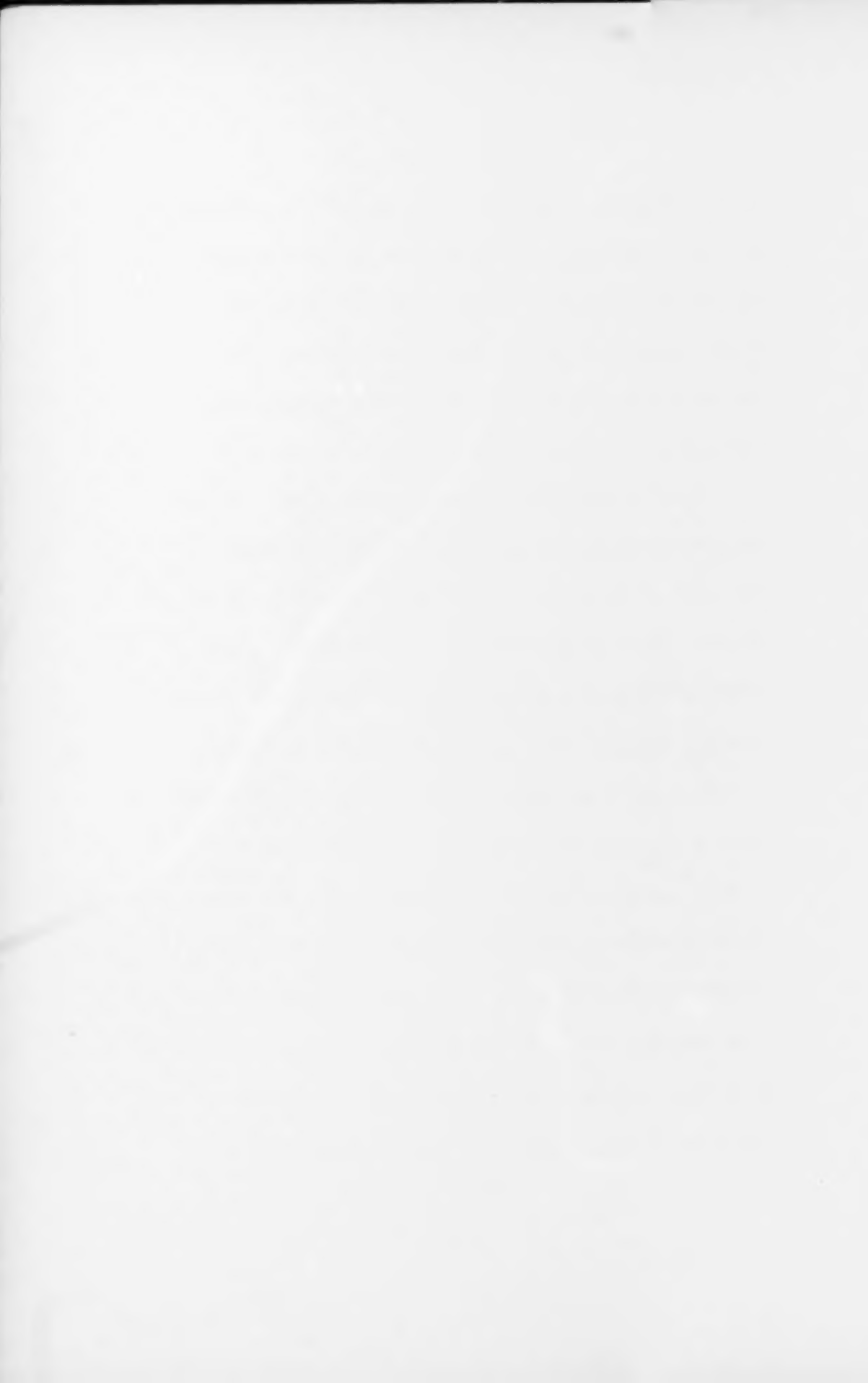
. . . there was a substantial question whether Drexel-Moseley would prevail on its constructive-trust claim. The constructive trust claim was not so strong as to make it an abuse of discretion to approve a settlement that roughly splits it in half.

This finding does not constitute a special and important question



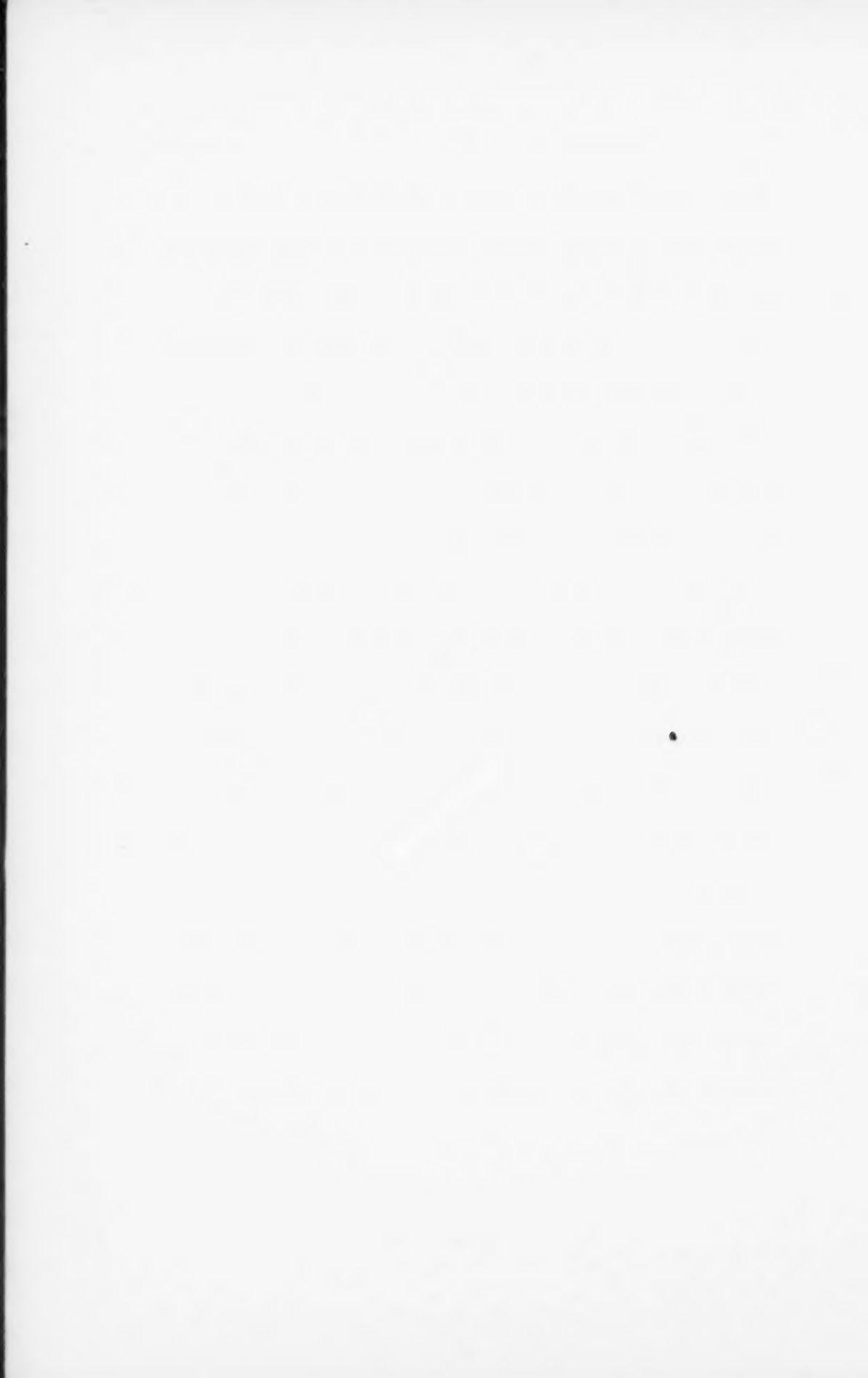
meriting review by this Court. Indeed, since the question of the application of Section 510(b) of the Bankruptcy Code was not even decided below, it is not properly before this Court for review.

Petitioner has summarized the arguments raised only by the proponents of the constructive trust claim. However, the argument of the estate (and creditors) in opposing the construction trust claim was that under 11 U.S.C. § 541, all property in which the debtor has a legal or equitable interest becomes property of the estate. At the commencement of the case, FTC had already deposited in its bank account the money raised from the sale of securities. Under § 510(b) of the Bankruptcy Code, the claims of allegedly



defrauded securities purchasers are expressly made subordinate to the claims of the general creditors. The Eighth Circuit thus observed that there existed substantial doubt as to the validity of the constructive trust theory advanced in this case on behalf of the securities purchasers.

In considering the fairness of the Sharing Agreement, the Eighth Circuit carefully reviewed the full legislative history of § 510(b). Included in the legislative history is the statement that individuals who, as investors, stand to profit from success of the business should not be allowed to shift the risk of loss arising from the business to creditors who do not have adequate means of preventing the loss.



The Eighth Circuit noted that the legislative history of § 510(b) gave substantial support to the position taken by the estate and creditors. However, the Eighth Circuit did not decide that § 510(b) would or would not prevail over the constructive trust theory.

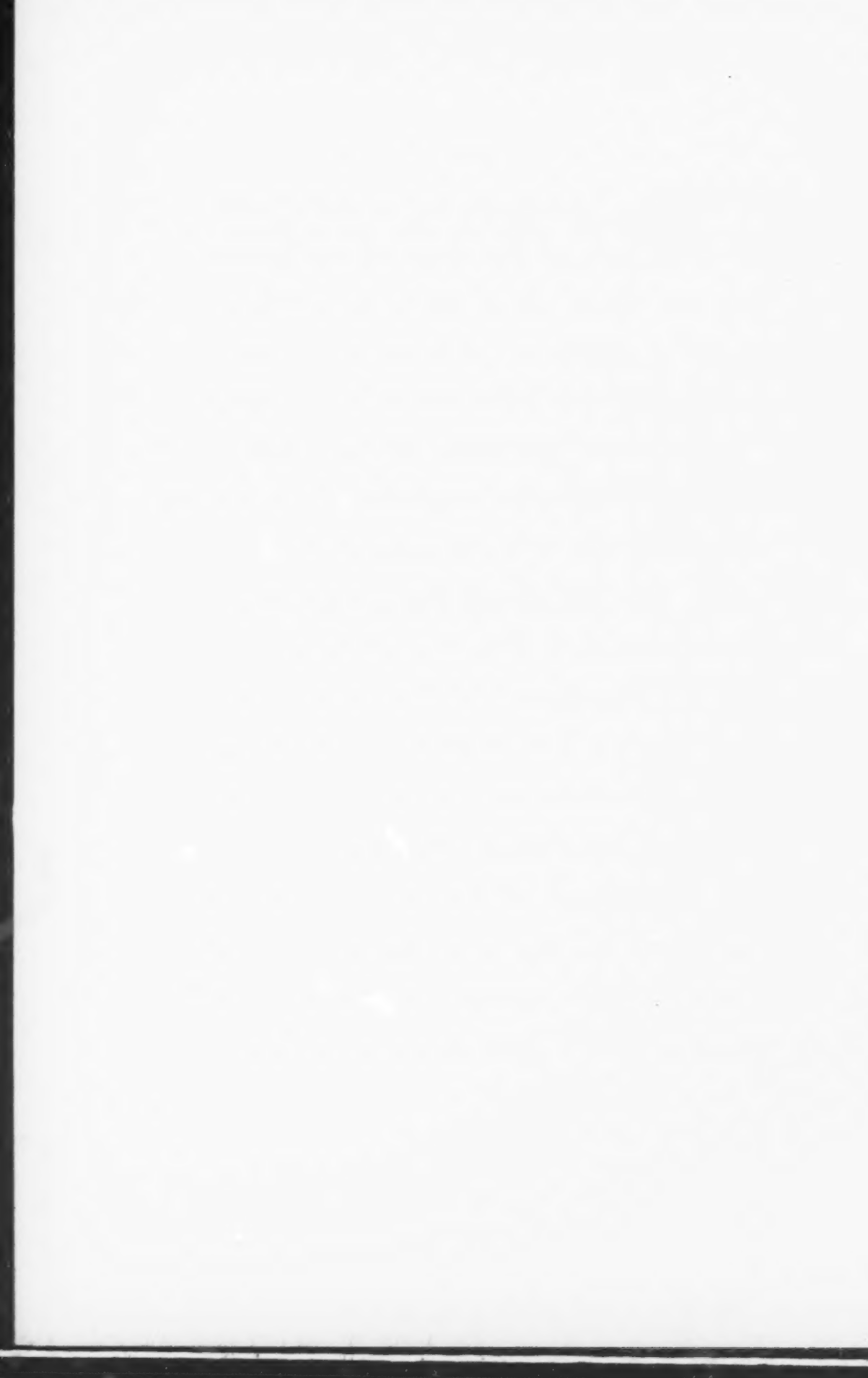
The lower courts carefully and intelligently reviewed the competing claims of both the estate and the securities holders, and concluded that the outcome of the dispute was in reasonable doubt. There is no sound reason to review by certiorari the legal merit of a constructive trust claim which was properly compromised and settled.



III.

THE LOWER COURTS HAD A SUFFICIENT
RECORD TO APPROVE THE SETTLEMENT
EMBODIED IN THE SHARING AGREEMENT.

The third issue which Petitioner seeks to raise by certiorari is the failure of the District Court to make more detailed findings of fact and conclusions of law supporting its orders approving the Sharing Agreement. In Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414 (1968), this Court did indicate that findings and conclusions should be ordinarily made, but cautioned that the ultimate test is whether there can be meaningful review of the basis on which the lower court made its order. Following this mandate, the Eighth Circuit reviewed



the extensive record before the District Court and concluded as follows:

Here, the record reflects that the District Court had before it the information necessary to consider the fairness of the Sharing Agreement.

For over one year, the constructive trust issue had been before the District Court. The District Court had, as a part of its record, exhaustive briefs and memoranda of law submitted by all parties who claimed an interest in the escrow fund. The District Court was therefore intimately familiar with both the underlying factual disputes and the legal positions asserted by all parties, both through briefs and also as a result of numerous conferences and hearings at which various aspects of the constructive trust claim were repeatedly raised.



Following proper notice, a hearing was held on June 27, 1983, during which time the District Court heard the arguments of counsel concerning the fairness and adequacy of the Sharing Agreement. As the transcript of that hearing shows, all counsel present were given the opportunity to be heard with respect to the question of the fairness, reasonableness, and adequacy of the Sharing Agreement. After granting the parties yet additional time to submit briefs, the District Court on July 15, 1983 issued orders approving the Sharing Agreement as a "fair, adequate and reasonable settlement", and "in the best interests of the estate and creditors and other interested parties. . . "



The record of proceedings before the District Court was more than sufficient to permit a reasoned review by the Eighth Circuit of the District Court's approval of the Sharing Agreement. For the Eighth Circuit to have sent this case back to the District Court for more detailed findings and conclusions would have been absurd, and only caused further delay. When the record before a lower court is so substantial and all parties have been given adequate opportunity to be heard, further detailed findings are not necessary. The absence of more detailed findings does not provide any basis for a grant of certiorari by this Court.



CONCLUSION

The Petitioner fails to state any sound reason for this Court to grant certiorari. No important or significant questions are presented which have precedential value. The Sharing Agreement is simply the settlement of a controversy, and the lower courts acted carefully and properly before approving that settlement. The process of settlement has always been encouraged by this Court, and the granting of petitioner's writ would frustrate the salutary purpose of settlement - which is to more promptly resolve controversy and reduce judicial congestion.

For all the reasons set forth above, Respondents respectfully urge that the petition for writ of certiorari be denied.

8-12-2

Respectfully submitted,

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